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HOUSE OF REPRESENTATIVES
REPORT
105–424

TUCKER ACT SHUFFLE RELIEF ACT OF 1997

MARCH 3, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 992]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 992) to end the Tucker Act shuffle, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Tucker Act Shuffle Relief Act of 1997".

SEC. 2. TUCKER ACT SHUFFLE RELIEF.

(a) IN GENERAL.—

(1) GRANT OF CONCURRENT JURISDICTION.—Except as provided in paragraph (3), the United States district courts and the United States Court of Federal Claims shall each have original jurisdiction to hear and determine all claims (whether for monetary or other relief) arising out of agency action alleged—

(A) to constitute a taking in violation of the fifth article of amendment to the Constitution of the United States; or

(B) not to constitute such a taking only because the action was not in accordance with lawful authority.

(2) ELECTION BY PLAINTIFF.—The plaintiff, by commencing an action under this section, elects which court shall hear and determine those claims as to that plaintiff.

(3) PARTIES INVOLUNTARILY JOINED.—No third party may be involuntarily joined to a case, within the jurisdiction of the Court of Federal Claims by reason of this section, if that party would be entitled to a determination of the claim with respect to which that party is joined by a court established by or under article III of the Constitution of the United States.

(b) EQUITABLE AND DECLARATORY REMEDIES.—With respect to any claim within its jurisdiction by reason of this section, the Court of Federal Claims shall have the power to grant equitable and declaratory relief when appropriate.

(c) APPEALS.—Any appeal from any action commenced under this section shall be to the United States Court of Appeals for the Federal Circuit.

(d) DEFINITIONS.—As used in this Act, the term—

(1) "agency" means a department, agency, independent agency, or instrumentality of the United States, including any military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the United States Government; and

(2) "agency action" means any action or decision taken by an agency.

(e) CONFORMING AMENDMENT TO TITLE 28, United States Code, Relating to Jurisdiction Over Tort Claims.—Section 1346(b) of title 28, United States Code, is amended by inserting "and the Tucker Act Shuffle Relief Act of 1997" after "chapter 171 of this title".

SEC. 3. REPEAL OF LIMITATION ON FEDERAL CLAIMS COURT JURISDICTION BECAUSE OF PENDENCY OF CLAIMS IN OTHER COURTS.

(a) IN GENERAL.—Section 1500 of title 28, United States Code, is repealed.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 91 of title 28, United States Code, is amended by striking out the item relating to section 1500.

Amend the title so as to read:

A bill to end the Tucker Act shuffle, and for other purposes.

PURPOSE AND SUMMARY

H.R. 992 is intended to end the "Tucker Act Shuffles" that currently can bounce property owners between U.S. District Courts and the Court of Federal Claims when seeking redress against the federal government for the taking of their property. The bill's principal effect would be to grant both U.S. District Courts and the Court of Federal Claims the power to determine all claims arising out of federal agency actions alleged to constitute takings in viola-

tion of the Fifth Amendment (or not to constitute takings only because the actions were not in accordance with lawful authority).

BACKGROUND AND NEED FOR LEGISLATION

I. RELEVANT STATUTES

A. The Court of Federal Claims and the Tucker Act

Based upon the legal doctrine of sovereign immunity, the federal government can only be sued with its consent. Until 1855, individuals seeking compensation for federal government actions had to appeal to their members of Congress for private relief legislation. Then, the Court of Claims Act of 1855 established the U.S. Court of Claims to investigate claims based upon congressional laws, executive department regulations or express or implied contracts with the federal government, and then make recommendations to Congress as to compensation.[1]

In 1887, Congress passed the Tucker Act permitting claims based upon the U.S. Constitution to be brought in the Court of Claims (and granting circuit courts concurrent jurisdiction with the Court of Claims over claims for money damages up to $10,000).[2] Thus, individuals who believed their property had been taken by the federal government in violation of the Fifth Amendment[3] could seek compensation in federal court.

From these sources comes the present jurisdiction of the Court of Federal Claims:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[4]

This statute grants to the Court of Federal Claims jurisdiction over money damages. The court can also grant equitable relief (generally, injunctive relief) and declaratory relief (such as the declaration of a statute to be unconstitutional) in various situations as provided by statute.[5] Otherwise, U.S. District Courts are the judicial bodies that grant equitable and declaratory relief as to the actions of federal agencies.[6]

B. U.S. District Courts and the Administrative Procedure Act

Unless otherwise provided by statute, U.S. District Courts grant equitable relief pursuant to the Administrative Procedure Act

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[1] *See* Ch. 122, 10 Stat. 612.

[2] *See* Ch. 359, 24 Stat. 505.

[3] The Amendment provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

[4] 28 U.S.C. sec. 1491(a)(1). The U.S. District Courts' concurrent jurisdiction for claims up to $10,000 is found at 28 U.S.C. sec. 1346(a)(2).

[5] *See, e.g.,* 28 U.S.C. sec. 1491(b) (certain contract disputes with the federal government).

[6] U.S. District Courts were created by Congress pursuant to Article III of the Constitution. Article III provides that judges are appointed for life and that their salaries may not be diminished. The Court of Federal Claims was created by Congress pursuant to Article I of the Constitution. Federal law provides that Court of Federal Claims judges serve 15-year terms and that their salaries are equivalent to that of district court judges. *See* 28 U.S.C. secs. 171–72.

("APA"). The APA states that "[a] person suffering legal wrong because of [federal] agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof.[7] Under the APA, the district court shall—

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law. . . .[8]

Thus, if a property owner would prefer not to receive compensation for the federal government's confiscation of property (or other type of taking), but to challenge the government's very right to confiscate (or otherwise take) the property, the owner would go before a U.S. District Court seeking injunctive relief.[9]

C. 28 U.S.C. section 1500 and the Interaction of the Court of Federal Claims and U.S. District Courts

Section 1500 provides that:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.[10]

Where does this provision come from?—

> The lineage of this text runs back more than a century to the aftermath of the Civil War, when residents of the Confederacy who had involuntarily parted with property (usually cotton) during the war sued the United States for compensation in the Court of Claims, under the Abandoned Property Collection Act. . . . When these cotton claimants had difficulty meeting the statutory condition that they must have given no aid or comfort to participants in the rebellion . . . they resorted to

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[7] 5 U.S.C. sec. 702.

[8] 5 U.S.C. sec. 706.

[9] This works as follows:

[T]he Supreme Court has held that monetary relief for *unauthorized* Executive seizures is not available in the Claims Court. . . . "The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government,' and hence recovery is not available in the Court of Claims." . . .

[I]njunctive relief *is* available [in U.S. District Court] when the [property] owner proves that government officials lack lawful authority to expropriate his property.

Ramirez de Arellano v. *Weinberger,* 745 F.2d 1500, 1522 (D.C. Cir. 1984)(en banc) (emphasis in original) (footnote omitted), *vacated on other grounds and remanded,* 471 U.S. 1113 (1985), dismissed on other grounds, 788 F.2d 762 (D.C. Cir. 1986) (en banc), *quoting Regional Rail Reorganization Act Cases,* 419 U.S. 102, 127 n.16 (1974) (*quoting Hooe* v. *United States,* 218 U.S. 322,336 (1910)). Injunctive relief is also available in U.S. District Court "when the monetary compensation available exclusively in the Federal Court of Claims would be wholly inadequate to compensate the complainant for the alleged taking." *Transcapital Financial Corp.,* 44 F.3d at 1025.

[10] 28 U.S.C. sec. 1500.

> separate suits in other courts seeking compensation not from the Government as such but from federal officials, and not under the statutory cause of action but on tort theories such as conversion. . . . It was these duplicative lawsuits that induced Congress to prohibit anyone from filing or prosecuting in the Court of Claims "any claim . . . for or in respect to which he . . . shall have commenced and has pending" an action in any other court against an officer or agent of the United States. . . . The statute has long outlived the cotton claimants. . . .[11]

The effect of section 1500 is that: "(1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction. . . . (2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction. . . ."[12] Thus, if a property owner wishes to both challenge the appropriateness of a taking of property and pursue monetary damages arising from the taking, the owner must choose to pursue one claim before the other—both claims may not be pursued at the same time.

II. THE THREE TUCKER ACT SHUFFLES

This section will describe the "Tucker Act Shuffles" in the context of takings claims governed by the Fifth Amendment with a fact pattern drawn from the 1992 case of *Lucas* v. *South Carolina Coastal Council,*[13] in which the Supreme Court ruled that if an environmental statute preventing an owner of a beachfront lot from erecting any building operates to deny the owner of all economically beneficial use of the land, a compensable taking may have occurred.

A. Shuffle #1

A property owner in a *Lucas*-like situation might want one of two remedies. The first remedy would be injunctive relief under the APA. The owner might make a claim that the federal agency ordering the owner not to build on the beachfront property was acting in excess of statutory authority and would seek that the agency be enjoined from ordering him not to build. The owner would have to go to the appropriate U.S. District Court to pursue this claim. If the owner's lawyer mistakenly chose to file a suit in the Court of Federal Claims, the suit would eventually be dismissed. Suit in the proper court would then have to be filed.

The owner could alternately just desire to be compensated for his inability to build on his land. The owner would have to go to the Court of Federal Claims to pursue this claim (unless claiming damages of less than $10,000). If the owner's lawyer mistakenly chose to file a suit in a U.S. District Court, the suit would eventually be dismissed. Suit in the proper court would then have to be filed.

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[11] *Keene Corp.* v. *U.S.,* 508 U.S. 200, 206 (1993).
[12] *UNR Industries, Inc.* v. *U.S.,* 962 F.2d 1013, 1021 (Fed. Cir. 1992), *overruled on other grounds,* 113 S.Ct. 2039.
[13] 505 U.S. 1003.

B. Shuffle #2

The property owner might want to request both remedies discussed in the preceding section, in the alternative. The owner would first argue that the agency was acting in excess of statutory authority, and if that failed, would seek compensation for the property value lost as a result of enforcement of the order. The owner could not pursue both remedies in one court, but would have to go to a U.S. District Court for the injunctive relief and the Court of Federal Claims for a monetary award.

To make matters worse, section 1500 of title 28 of the U.S. Code prevents the owner from going to the Court of Federal Claims until a final decision has been reached in the suit in U.S. District Court. However, the Court of Federal Claims' statute of limitations prevents the owner from bringing suit more than "six years after [a] claim first accrues." [14] If the suit in U.S. District Court takes too long, the owner may be left without remedy. Even if the statute of limitations does not present a problem, a property owner must wait until all appeals have been exhausted on a suit in a district court before starting all over again before the Court of Federal Claims.

C. Shuffle #3

The attorney for a property owner might decide that the best legal theory to use against the government in order to gain compensation is "tortious interference with use of property" or some similar principle. However, the Federal Tort Claims Act provides that a tort claim is the one type of claim for monetary damages for which U.S. District Courts and not the Court of Federal Claims have jurisdiction.[15] If a district court rules that the attorney was mistaken and should have pursued money damages through a Fifth Amendment takings claim in the Court of Federal Claims, the suit will be dismissed. Unfortunately, by this time the Court of Federal Claims' statute of limitations may have run. Alternately, the Court of Federal Claims could make the opposite determination.

D. Consequences of the Tucker Act Shuffles

At best, the "Tucker Act Shuffles" needlessly delay, and increase the cost of, the ability of property owners to attain just relief when the federal government has confiscated their property. At worst, relief becomes unattainable. As Judge Loren Smith, Chief Judge of the Court of Federal Claims, has stated, the split in remedial jurisdiction between his court and the U.S. District Courts "tends to bring discredit upon the courts and make litigation in this area far more expensive." [16] And, as Nancie Marzulla, President and Chief Legal Counsel of the Defenders of Property Rights, has aptly pointed out, "nothing like this procedural nightmare exists for claimants seeking to enforce any other constitutional right." [17]

The "Tucker Act Shuffles" often lead to the waste of judicial resources. The Federal Circuit recently bemoaned the fact that they require it "to engage in the wasteful exercise of deciding not how

[14] 28 U.S.C. sec. 2501.
[15] *See* 28 U.S.C. sec. 1346(b)(1).
[16] *Hearing on H.R. 992 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary,* 105th Cong., 1st Sess. (Sept. 10, 1997) (hereinafter cited as *"Hearing"*).
[17] *Id.*

a dispute should be resolved, but what court should be responsible for resolving it."[18] And, as Justice Scalia has pointed out, "[n]othing is more wasteful than litigation about where to litigate, especially when all the options are courts within the same legal system that will apply the same law."[19]

III. H.R. 992

A. The legislation

H.R. 992 will end all three "Tucker Act Shuffles" by (1) granting both U.S. District Courts and the Court of Federal Claims the power to determine all claims—whether for monetary relief or other relief (such as injunctive and declaratory relief) and including related tort claims—arising out of federal agency actions alleged to constitute takings in violation of the Fifth Amendment (or not to constitute takings only because the actions were not in accordance with lawful authority),[20] (2) by granting the Court of Federal Claims the power to provide all remedies,[21] and (3) by repealing section 1500 of section 28 of the U.S. Code.

A property owner would elect which court shall hear and determine the claims as to him or herself. All appeals would be heard by the U.S. Court of Appeals for the Federal Circuit.

H.R. 992 makes no substantive change to Fifth Amendment takings jurisprudence and creates no new cause of action. It simply alters court jurisdiction over claims that may be brought under current law. Additionally, the bill does not grant the Court of Federal Claims jurisdiction over all tort claims brought under the Federal Tort Claims Act. The bill only provides ancillary jurisdiction when a tort claim arises out of federal agency action alleged to constitute a taking.

B. Ability under the Constitution of the Court of Federal Claims to Grant Equitable and Declaratory Relief

The Justice Department notes that under H.R. 992, "[t]he remedial powers of the Court of Federal Claims . . . would be essentially identical to the remedial powers of [U.S.] district courts[]" and then raises the concern that "assignment of these broad powers to the Article I Court of Federal Claims would raise serious constitutional difficulties. . . ."[22]

The Justice Department's concern is not warranted. It is belied by the Court of Federal Claims' current statutory powers. The court can already can provide declaratory and equitable relief in

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[18] *National Center for Manufacturing Sciences* v. *U.S.,* 114 F.3d 196, 197 (Fed. Cir. 1997).

[19] *Id., quoting Bowen* v. *Massachusetts,* 487 U.S. 879, 930 (1988) (Scalia, J., dissenting).

[20] The provision of concurrent jurisdiction to provide "monetary relief" would partially overturn *Bowen* v. *Massachusetts,* 487 U.S. 879 (1988), where the Supreme Court ruled that in some instances the provision of monetary relief is an equitable remedy that can be granted by U.S. District Courts and presumably cannot be granted by the Court of Federal Claims. *Bowen* can result in a Tucker Act Shuffle #4, because the government can argue that the monetary relief at issue could only be granted by the Court of Federal Claims, or, alternately, by a U.S. District Court.

[21] A provision is not needed to allow U.S. District Courts to provide monetary remedies because current law grants these courts the ability to provide all remedies for claims within their jurisdiction. *See* 28 U.S.C. sec. 1651.

[22] Letter from Assistant Attorney General Andrew Fois to Representative Lamar Smith at 2–3 (Sept. 8, 1997) (hereinafter cited as *"Letter"*).

various areas encompassing about 40% of its docket.[23] The Supreme Court in 1991 emphasized the "Court's time-honored reading of the Constitution as giving Congress wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals."[24]

In those cases where the Court of Federal Claims believes a statute to be unconstitutional, the court clearly has the power to provide equitable and declaratory relief. The court has the inherent authority and duty to disregard unconstitutional statutes, as does any other federal court. Thus, in *IBM Corp.* v. *U.S.,*[25] the Federal Circuit recently affirmed a ruling by the Court of Federal Claims declaring a federal tax statute to be unconstitutional.

Finally, federal agency heads grant equitable and declaratory relief in the form of final orders all the time. Very often, these orders are appealable directly to federal courts of appeal.[26] Likewise, the Court of Federal Claims' granting of such relief in takings cases under this bill may be viewed as final orders of a federal agency that are reviewable by the U.S. Court of Appeals for the Federal Circuit.

The Justice Department states that "[a]ssignment of . . . broad powers to the Article I Court of Federal Claims would raise serious constitutional difficulties under *Northern Pipeline*. . . ."[27] In *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.,*[28] the Supreme Court did rule that the legislative (created pursuant to Article I of the Constitution) bankruptcy court established by Congress in 1978 was unconstitutional because it was to exercise powers that only Article III courts (whose judges enjoyed life tenure and protection against salary diminution) could exercise. However, the bankruptcy court was established to at least in part adjudicate cases involving "private rights" ("the liability of one individual to another under the law . . ."[29]). The Court made clear that "*only* controversies [involving 'public rights,' that at a minimum arise 'between the government and others'[30]] may be removed from Article

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[23] *See Hearing* (statement of Loren Smith, Chief Judge, U.S. Court of Federal Claims). For example:

(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

28 U.S.C. sec. 1491(b). *See also* 28 U.S.C. sec. 1507.

[24] *Freytag* v. *Commissioner,* 501 U.S. 868, 889 (1991). This case involved the U.S. Tax Court, another Article I court.

[25] 59 F.3d 1234 (Fed. Cir. 1995), *aff'd,* 116 S. Ct. 1793 (1996).

[26] *See, e.g.,* 28 U.S.C. sec. 2341 *et seq.*

[27] *Letter* at 3.

[28] 458 U.S. 50 (1982).

[29] *Id.* at 69–70, *quoting Crowell* v. *Benson,* 285 U.S. 22, 51 (1932).

[30] *Northern Pipeline,* 458 U.S. at 69, *quoting Ex parte Bakelite Corp.,* 279 U.S. 438, 451 (1929). In *Granfinanciera, S.A.* v. *Nordberg,* 492 U.S. 33 (1989), the Court ruled that "the Federal Government need not be a party for a case to revolve around 'public rights.'" *Id.* at 54 (citation omitted).

III courts and delegated to legislative courts or administrative agencies for their determination."[31]

The Court in Northern Pipeline noted that:

> This Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving 'public rights.' . . .
>
> This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. . . . But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments' . . . and only to matters that historically could have been determined exclusively by those departments. . . . The understanding of [the quoted Supreme Court cases] is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.[32]

When adjudicating Fifth Amendment takings claims, the Court of Federal Claims is clearly adjudicating public rights. Under *Northern Pipeline,* there is no constitutional impediment to the court being able to provide all manners of relief.[33]

In *Commodity Futures Trading Commission* v. *Schor,*[34] the Supreme Court indicated that other factors should also be taken into account in determining the appropriateness of adjudication by non-Article III courts, stating that "this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights. . . ."[35]

The Court stated that:

> [T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. . . . This inquiry, in turn, is guided by the principle that "practical attention to substance rather than

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[31] *Northern Pipeline,* 458 U.S. at 70 (emphasis in original).

[32] *Id.* at 67–68 (footnotes and citations omitted).

[33] The Court in *Northern Pipeline* stated that "[w]hen Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Article III judicial review." *Id.* at 70 n.23 (citation omitted). H.R. 992 assigns judicial review to the U.S. Court of Appeals for the Federal Circuit, an Article III court. In *Thomas* v. *Union Carbide Agricultural Products Co.,* 473 U.S. 568 (1985), the Court approvingly noted the availability of review by an Article III court, stating that "in the circumstances, the review afforded preserves the 'appropriate exercise of the judicial function.'" *Id.* at 592, *quoting Crowell* v. *Benson,* 285 U.S. 22, 54 (1932).

[34] 478 U.S. 833 (1986).

[35] *Id.* at 853.

doctrinaire reliance on formal categories should inform application of Article III."[36]

What are the purposes underlying Article III? "Article III . . . serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' . . . and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'"[37]

As to the latter purpose, "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. . . . [and] Article III's guarantee of an impartial and independent federal adjudication is subject to waiver . . . ."[38]

Since H.R. 992 provides property owners with the option of bringing their claims before Article III courts, property owners choosing the Court of Federal Claims should be understood as having waived their right to adjudication by Article III courts. Since the President appoints the judges on the Court of Federal Claims,[39] it is hard to argue that adjudication before this court will subject the executive branch to domination by another branch of government.

As to the former purpose:

> In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. . . . [S]uch rules . . . might . . . unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative. . . . Among the factors . . . are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[40]

This Committee has compelling concerns in wanting to expand the jurisdiction of the Court of Federal Claims. The three "Tucker Act Shuffles" currently act to frustrate citizens' rights to protect and enjoy the fruits of their property. Property rights are a fundamental component of the Western concept of liberty, and were considered as such by our Founding Fathers.[41] Granting the Court of Federal Claims the ability to provide equitable and declaratory

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[36] *Id.* at 847–48, *quoting Thomas* v. *Union Carbide Agricultural Products Co.,* 473 U.S. 568, 587 (1985).

[37] *Commodity Futures Trading Commission,* 478 U.S. at 848, *quoting Thomas,* 473 U.S. at 583 and *United States* v. *Will,* 449 U.S. 200, 218 (1980), respectively.

[38] *Commodity Futures Trading Commission,* 478 U.S. at 848.

[39] *See* 28 U.S.C. sec. 171.

[40] *Commodity Futures Trading Commission,* 478 U.S. at 851.

[41] *See* Ely, Jr., *The Guardian of Every Other Right* (1992).

relief gives property owners the tools needed to more effectively vindicate these rights.

Further, the Court of Federal Claims already has the ability to grant equitable and declaratory relief in many areas of its jurisdiction. H.R. 992 only seeks to narrowly extend this power of the court to cases implicating the takings clause of the Fifth Amendment.

Finally, in weighing the stated factors, the Court considered the right of litigants to elect either an Article I or Article III court, and supervisory control by an Article III court, as important elements pointing towards the appropriateness of adjudication by an Article I court.[42] H.R. 992 provides for such an election by property owners. In having all appeals heard by the U.S. Court of Appeals for the Federal Circuit, the bill also provides for supervisory review by an Article III court.

For the above reasons, H.R. 992 proposes changes in court jurisdiction that are constitutionally permissible according to the analysis required by *Northern Pipeline* and *Commodity Futures Trading Commission.*

C. Necessity for Statutory Repeal of Section 1500

Judge Loren Smith states that the repeal of section 1500 "will significantly improve the administration of justice at the [C]ourt [of Federal Claims]. Section 1500 today serves no useful purpose and is a serious trap for the unsophisticated lawyer or plaintiff."[43]

The Justice Department argues that the decision in *Loveladies Harbor, Inc.* v. *U.S.*[44] obviates the need to repeal sec. 1500.[45] This is not the case. In *Loveladies Harbor,* the U.S. Court of Appeals for the Federal Circuit ruled that "[f]or the Court of Federal Claims to be precluded from hearing a claim under section 1500, the claim pending in another court must arise *from the same operative facts* and must seek *the same relief.*"[46] A pending suit in a U.S. District Court for injunctive relief did not bar a later-filed case in the Court of Federal Claims for monetary damages—the relief sought in both cases was different.

Loveladies Harbor was an extremely sympathetic plaintiff. Suits were brought in a U.S. District Court and the Court of Federal Claims in 1982 and 1983, respectively, and the Federal Circuit did not decide until 1994 the issue of whether the Court of Federal Claims' judgment should be vacated. If the Federal Circuit had ruled differently, the Court of Federal Claims' six year statute of limitations would have barred Loveladies Harbor from seeking monetary relief for its loss. Three dissenting judges argued that the case was decided wrongly and that only the similarity of the facts underlying the two suits is statutorily relevant in deciding whether section 1500 applies.[47] In future litigation, the Justice Department may argue and persuade courts that the theory enunciated in *Loveladies Harbor* should be limited to its facts. Repeal of section 1500 will ensure that this does not happen.

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[42] *Commodity Futures Trading Commission,* 478 U.S. at 855.
[43] *Hearing.*
[44] 27 F. 3d 1545 (Fed. Cir. 1994).
[45] *See Hearing* (statement of Assistant Attorney General Eleanor Acheson).
[46] *Loveladies Harbor,* 27 F.3d at 1551 (emphasis in original).
[47] *See id.* at 1556–60 (Mayer, Nies & Rader, dissenting).

The Justice Department argues that repeal of section 1500 will allow for forum shopping: "For example, if section 1500 were repealed, a plaintiff would be able to begin litigating aspects of a contract claim in district court and subsequently initiate a suit before the Court of Federal Claims in an effort to find the most sympathetic forum."[48] However, as the Justice Department had admitted, under current law "the government presumably would have the right to transfer the cases and consolidate them in one forum. . . ."[49]

D. Concerns over Forum Shopping

All appeals in cases commenced by authority of this bill will be heard by the Court of Appeals for the Federal Circuit. Thus, precedent in takings cases will remain uniform regardless of what trial court—a U.S. District Court or the Court of Federal Claims—a property owner initially chooses. A citizen will not be able to avoid unfavorable precedent by going to one court or the other.

E. The Watt Amendment

Representative Melvin Watt unsuccessfully offered an amendment during Committee consideration of H.R. 992 that would have granted U.S. District Courts, but not the Court of Federal Claims, jurisdiction to determine all claims (whether for monetary or other relief) arising out of alleged takings (or agency actions not constituting takings because they were not in accordance with lawful authority).[50]

Assistant Attorney General Eleanor Acheson testified at the Subcommittee on Immigration and Claims' hearing on H.R. 992 that "[t]he Court of Federal Claims has developed experience in resolving and streamlining cases under the Just Compensation Clause. . . ."[51] In addition, she stated that "takings claims may involve extensive discovery and trial on significant issues with which a federal district court has little experience."[52] It would make little sense for Congress to grant only U.S. District Courts the power to provide complete relief in takings cases, forcing many property owners to continue to adjudicate their claims in two different courts should they want to rely on the Court of Federal Claims' expertise. This is the type of dilemma the bill was designed to end.

The Congress should endeavor to make it as easy as possible for property owners to vindicate their rights after their property has been taken by the federal government. If property owners want to pursue their claims in courts close to home, they should be able to choose U.S. District Courts. If property owners want to utilize the expertise of a specialized tribunal, they should be able to choose the Court of Federal Claims.

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[48] *Hearing* (statement of Assistant Attorney General Eleanor Acheson).
[49] *The Right to Own Property: Hearing on S. 605 Before the Senate Comm. on the Judiciary,* 104th Cong., 1st Sess. 49 (1995) (statement of John Schmidt, Associate Attorney General).
[50] The amendment also would have struck the bill's repeal of section 1500 of title 28 of the U.S. Code.
[51] *Hearing.*
[52] *Id.*

HEARINGS

The Committee's Subcommittee on Immigration and Claims held one day of hearings on H.R. 992 on September 10, 1997. Testimony was received from Michael Noone, Catholic University of America, Columbus School of Law; Stephen Kinnard, Skadden, Arps, Slate, Meagher & Flom; John Echeverria, Georgetown University Law Center; Eleanor Acheson, Assistant Attorney General, Office of Policy Development, U.S. Department of Justice; the Honorable Loren Smith, Chief Judge, U.S. Court of Federal Claims; Nancie Marzulla, President and Chief Legal Counsel, Defenders of Property Rights; Wallace Klussmann; and Edward Baird, Jr., Wilcox & Baird. Additional material was received from Ms. Marzulla.

COMMITTEE CONSIDERATION

On October 6, 1997 the Subcommittee on Immigration and Claims met in open session and ordered reported the bill H.R. 992 with an amendment in the nature of a substitute, by a voice vote, a quorum being present. On October 7, 1997, the Committee met in open session and ordered reported favorably the bill H.R. 992 without amendment by a recorded vote of 17 to 13, a quorum being present.

VOTE OF THE COMMITTEE

There were two recorded votes (one on an amendment and one on final passage) during the Committee's consideration of H.R. 992, as follows:

ROLLCALL NO. 1.

Amendment offered by Mr. Watt to grant U.S. District Courts, but not the Court of Federal Claims, jurisdiction to determine all claims (whether for monetary or other relief) arising out of alleged takings, and to strike the repeal of section 1500 of title 28 of the U.S. Code. Defeated 12–16.

AYES	NAYES
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. Sensenbrenner
Mr. Berman	Mr. Gekas
Mr. Nadler	Mr. Coble
Mr. Scott	Mr. Smith
Mr. Watt	Mr. Gallegly
Ms. Lofgren	Mr. Canady
Ms. Jackson Lee	Mr. Inglis
Ms. Waters	Mr. Goodlatte
Mr. Delahunt	Mr. Buyer
Mr. Wexler	Mr. Bryant
Mr. Rothman	Mr. Chabot
	Mr. Barr
	Mr. Jenkins
	Mr. Hutchinson
	Mr. Cannon

ROLLCALL NO. 2

Vote on Final Passage: Adopted 17–13.

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. Sensenbrenner	Mr. Frank
Mr. Gekas	Mr. Berman
Mr. Coble	Mr. Nadler
Mr. Smith	Mr. Scott
Mr. Gallegly	Mr. Watt
Mr. Canady	Ms. Lofgren
Mr. Inglis	Ms. Jackson Lee
Mr. Goodlatte	Ms. Waters
Mr. Buyer	Mr. Meehan
Mr. Bono	Mr. Delahunt
Mr. Bryant	Mr. Wexler
Mr. Chabot	Mr. Rothman
Mr. Barr	
Mr. Jenkins	
Mr. Hutchinson	
Mr. Cannon	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 992, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 23, 1997.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 992, the Tucker Act Shuffle Relief Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis, who can be reached at 226–2860.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

cc: Honorable John Conyers, Jr.,
Ranking Minority Member.

H.R. 992—Tucker Act Shuffle Relief Act of 1997

H.R. 992 would grant jurisdiction over certain claims against the United States to both the U.S. Court of Federal Claims and U.S. district courts. Specifically, the bill would give these courts the authority to adjudicate all claims against the government arising from actions of federal agencies that are alleged to take private property in violation of the U.S. Constitution. Plaintiffs would choose which court would hear their claim, and either court would have the power to grant monetary or any other relief (such as injunction).

Based on information provided by a number of federal and private legal authorities. CBO estimates that enacting H.R. 992 would have no significant effect on the budget because its provisions would not affect the outcome of complaints or cause any material change in the caseload of the federal court system. Only a small percentage of lawsuits brought against the United States in any given year involve takings of property and the number of these that go to trial is smaller still. It is unclear whether the bill would have any effect on the outcome of the number of such suits. The bill could result in earlier decisions in some proceedings, which may change the timing of federal court and agency costs, but we expect that such effects would be minimal.

Section 4 of the Unfunded Mandates Reform Act of 1995 excludes from application of that act legislative provisions that enforce constitutional rights of individuals. Because the changes to federal jurisdiction over property rights cases could involve the enforcement of certain individual constitutional rights, S. 992 may be excluded. In any event, because the changes only affect federal court procedures, the bill would not impose any enforceable duties on state, local, or tribal governments or the private sector.

The CBO staff contact for this estimate is Deborah Reis, who can be reached at 226–2860. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article 1, section 8, clauses 9 and 18, and Article 4, section 3, clause 2, of the Constitution.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The Act may be cited as the "Tucker Act Shuffle Relief Act of 1997."

SECTION 2. TUCKER ACT SHUFFLE RELIEF

Subsection (a)(1) of section 2 provides that U.S. District Courts and the Court of Federal Claims shall each have original jurisdiction to hear and determine all claims—whether for monetary relief or other relief (such as injunctive and declaratory relief) and including related tort claims—arising out of the action of a federal agency alleged (1) to constitute a taking in violation of the Fifth Amendment, or (2) not to constitute such a taking only because the action was not in accordance with lawful authority. A property owner would typically state a claim in the alternative: the agency action is invalid and should be enjoined, but if it is ruled to be valid, then compensation should be paid pursuant to the Fifth Amendment. To the extent necessary, this subsection overrides "preclusive review" statutes in federal law.

Subsection (a)(2) of section 2 provides that the plaintiff shall elect which court—a U.S. District Court or the Court of Federal Claims—shall hear and determine the claims as to that plaintiff. The court in which the plaintiff commences an action is the court elected.

Subsection (a)(3) of section 2 provides that a third party cannot be involuntarily joined to a takings case that is being considered by the Court of Federal Claims only by reason of section 2 if the party would be entitled to a determination by an Article III court of the claim with respect to which the party is to be joined.

Subsection (b) of section 2 provides that the Court of Federal Claims shall have the power to grant equitable and declaratory remedies when appropriate with respect to claims made part of its jurisdiction by section 2.

Subsection (c) of section 2 provides that all appeals from actions commenced under the section in either U.S. District Courts or the Court of Federal Claims shall be to the U.S. Court of Appeals for the Federal Circuit.

Subsection (d) of section 2 provides definitions of "agency" and "agency action."

Subsection (e) of section 2 amends section 1346(b) of title 28 of the U.S. Code. Section 1346(b) allocates court jurisdiction over actions for money damages alleging the commission of torts by federal employees (while acting within the scope of their office or employment). The section is amended to clarify that while U.S. District Courts usually have exclusive jurisdiction over such actions, the Court of Federal Claims also has jurisdiction over tort actions

where there is a related claim brought pursuant to section 2 of this bill.

Section 3 repeals section 1500 of title 28 of the U.S. Code. This repeal is complete and is not limited to Fifth Amendment takings cases.

AGENCY VIEWS

Assistant Attorney General Eleanor Acheson stated in testimony before the Subcommittee on Immigration and Claims on September 10, 1997, that the U.S. Department of Justice opposed H.R. 992 as introduced.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

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§ 1346. United States as defendant

(a) * * *

(b)(1) Subject to the provisions of chapter 171 of this title *and the Tucker Act Shuffle Relief Act of 1997*, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * * *

CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

Sec.

1491. Claims against United States generally; actions involving Tennessee Valley Authority.

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[1500. Pendency of claims in other courts.]

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[§ 1500. Pendency of claims in other courts

[The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.]

DISSENTING VIEWS

H.R. 992 "TUCKER ACT SHUFFLE RELIEF ACT OF 1997"

We oppose H.R. 992 because it is unconstitutional, will lead to duplicative litigation and forum shopping, and raises environmental and other policy concerns. Although the bill's goal is worthwhile, the legislation itself is flawed and we dissent for the following reasons.

I. H.R. 992 is Unconstitutional

The stated purpose of the Tucker Act Shuffle Relief Act of 1997 is to eliminate the so-called "shuffle" between the U.S. District Courts and the U.S. Court of Claims in takings cases. H.R. 992 would achieve this goal by expanding the jurisdiction of both the Court of Federal Claims and the U.S. District Courts. The bill provides that the "United States District Courts and the United States Court of Federal Claims shall each have original jurisdiction to hear and determine all claims (whether for monetary or other relief) arising out of agency action alleged to constitute a taking."

Currently, a property owner must file two separate lawsuits in order to challenge the validity of an agency action and obtain compensation if the agency action cannot be invalidated. The lawsuit to invalidate the agency action must be filed in the U.S. District Court, which is an Article III court. Only Article III courts have the power of judicial review and the power to enjoin agency actions. In order to obtain monetary relief, the property owner must file a lawsuit in the Court of Federal Claims, which has the sole authority to award monetary compensation in a takings case. Generally, when two such lawsuits are filed, proceedings in the Claims Court are stayed until the substantive challenge pending in the District Court is resolved.

Proponents of H.R. 992 believe that expanding the jurisdiction and powers of the U.S. Court of Federal Claims will simplify and expedite judicial proceedings. While all of us support simplifying and expediting judicial proceedings, we cannot support undermining the Constitution to achieve that goal. Expanding the jurisdiction and equitable powers of the Court of Claims, as envisioned by H.R. 992, violates the Constitution by improperly extending the authority of Article III courts to Article I Courts. The Supreme Court

has previously ruled that Congress cannot grant an Article I court the remedial powers of an Article III court. In *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982), the Court invalidated a broad expansion of Article I Bankruptcy Court jurisdiction on the grounds that giving Article III powers to the Bankruptcy Court would represent an "encroachment or aggrandizement" at the expense of Article III courts.

Although we object to expanding of the authority of the Court of Claims, we believe that there may be a way to achieve the goals of H.R. 992 without violating the Constitution. The Ranking Member of the Immigration and Claims Subcommittee, Melvin L. Watt (D–NC), offered an amendment which would have permitted plaintiffs to choose either to bifurcate their case between the Court of Claims and the U.S. District Court or to consolidate all claims in the U.S. District Court. The amendment would have also permitted appeals of the consolidated cases to be heard in the Appellate Circuit where the District Court is located. This would prevent the overburdening the docket of the Court of Appeals for the Federal Circuit. Unfortunately, the amendment failed by a vote of 12–16.

II. H.R. 992 Will Lead to Duplicative Litigation and Forum Shopping

If Mr. Watt's amendment were adopted, it would have also preserved Section 1500 of Title 28, which divests jurisdiction of the Court of Claims when a similar claim has been filed or is pending in any other court. If Section 1500 were eliminated, we would expect to see a rash of duplicative litigation and forum shopping which would unnecessarily waste limited judicial resources.

Proponents of H.R. 992 assert that elimination of Section 1500 is necessary to protect plaintiffs against sophisticated legal maneuvering by lawyers challenging the jurisdiction of various courts. However, in *Loveladies Harbor, Inc.* v. *U.S.,* 27 F.3d 1545 (Fed. Cir. 1994), the Federal Circuit settled jurisdictional questions surrounding Section 1500 by concluding it only precluded actions seeking the same relief. Therefore, a claim arising out of the same event but seeking different relief, could still be adjudicated in both the District Court and the Court of Claims. Accordingly, the concerns raised by proponents of HR 992 regarding Section 1500 are unwarranted.

III. H.R. 992 Raises Environmental and Other Policy Concerns

Passage of H.R. 992 also raises several serious public policy concerns. HR 992 could be construed to undermine various preemptive review provisions in federal environmental statutes. For example, the Clean Air Act limits judicial review of its regulations to the U.S. Court of Appeals for the District of Columbia. HR 992 could be construed as overriding this provision, thereby granting any District Court or the Court of Claims jurisdiction to invalidate any clean air regulations which operate to limit property rights. This could significantly increase the chance of multiple, inconsistent rulings on agency actions and lead to further opportunities to forum shop.

In light of the consequences of overriding preemptive review, some are concerned that the underlying purpose of this provision

of HR 992 is to discourage Congress from passing any future environmental legislation since they can only operate efficiently with strong preemptive review provisions. Without such statutes, however, property owners will be free from reasonable limitations placed on them for the purpose of protecting the public's health and safety.

Second, granting equitable and declaratory powers to Article I judges serving on the Court of Federal Claims could unnecessarily extend the opportunity to engage in judicial activism to that court. Since many proponents of HR 992 also count themselves among the harshest critics of judicial activism, such a extension of the Court of Federal Claims authority seems incongruous.

Finally, HR 992 has the net effect of unjustly elevating takings actions for specialized treatment under the Tucker Act. There are other situations, not involving property rights, where a plaintiff must bifurcate causes of action arising from the same situation between the Court of Federal Claims and District Courts—*e.g.,* a breach of contract action against the United States and an invalidation action.[1] If bifurcation is a problem in the property rights context, it is a problem in these contexts as well. Yet, if H.R. 992 is passed, such claims will be disparately treated.

JOHN CONYERS, Jr.
BARNEY FRANK.
HOWARD L. BERMAN.
ROBERT C. SCOTT.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.

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[1] CRS Report, *supra* n. 4 at 3. *See* statement of Prof. Michael F. Noone at Sept. 10, 1997 Subcommittee hearing.